IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
ORDER

Bharta Ram vs. State of Rajasthan & Ors.
(S.B.Criminal Appeal No.147/88)

Date of Order :- 20th November, 2006.

PRESENT

HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Mr. R.K.Charan,Advocate, for the appellant.
Mr.Rameshwar Dave, Public Prosecutor for the State.

REPORTABLE

This appeal is directed against the judgment dated 10.3.1988 passed by the learned Additional Sessions Judge, Barmer convicting thereby the accused appellant for offence u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985(in short "the Act of 1985") and sentencing him to undergo ten years' Rigorous Imprisonment with a fine of Rs.1,00,000/-, in default of payment whereof, to further undergo one year's Rigorous Imprisonment.

The factual matrix of the case is that on 25th

February, 1986 at about 12.30 p.m. Shri Banedan, S.H.O. of Police Station, Chauhatan alongwith Leela Dhar, H.C. and Uttama Ram, constable and other police party went on patrolling duty. Upon reaching outskirts of village Dhok Dhoniya at about 5 p.m. they laid "Nakabandi" during which they noticed one person coming from village Dharasar . On seeing the police party, the said person left the road and started moving towards other side. The police suspected his conduct and therefore intercepted him. On enquiry being made, he disclosed his name as Bharta Ram s/o Ganesh Ram Jat r/o Dharasar. On being searched, a plastic bag containing some black substance was found from left pocket of his coat. When this was tested and smelled, it was found to be opium. Its weight was found to be of 160 gms. He denied having any permit to possess licence of the said opium. Out of total recovered opium, 30 gms. was put in a small box which was sealed then and there. Remaining 130 gms. of opium was placed in a polythene bag and also sealed. On reaching the Police Station, regular criminal case was registered and investigation commenced. Finally challan against the accused

appellant for offence u/s 18 of the Act was filed. While prosecution has examined as many as seven witnesses in support of his case and exhibited 12 documents, accused in his defence apart from his statement u/s 313 Cr.P.C. , examined two witnesses. On conclusion of the evidence and upon hearing of the arguments, the learned trial Court convicted the accused as mentioned hereinabove. Being aggrieved by the judgment of the learned trial Court, the accused appellant has preferred this appeal on various grounds.

I have heard Mr.R.K.Charan, learned counsel for the appellant and Mr. Rameshwar Dave, learned Public Prosecutor for the State in support of their respective case and perused the record.

Sheet anchor of the arguments of Mr.R.K.Charan, learned counsel for the appellant is that on the date of alleged search and recovery of the opium i.e. on 25th February, 1986, P.W. 5 Banedan, S.H.O. of Police Station,Chauhatan was not empowered to seize, search and arrest the accused under the

provisions of the Act since he was merely an officer of the rank Sub Inspector of Police.The State Government vide its notification dated 16.1.1986 has for the first time authorised police officers to search, seize and apprehend the culprits under the Act of 1985.Hence, the trial and consequential conviction of the appellant was vitiated and impugned judgment is therefore liable to be set aside. In order to buttress his argument,learned counsel relied upon the judgments of this Court in (1)Nand Lal vs. The State of Rajasthan,RCC, 1987 p.433 (2) Umrav vs. State of Rajasthan, RLW 1988(1)p.564 (3)Shanti Lal vs. State of Rajasthan, WLC 1989(1)p.276 (4) Bherulal vs. State of Rajasthan,2004(1) Cr.L.R.(Raj.) p.612 and (5)Harchand vs. State of Rajasthan, 2006(6) RDD p.3533(Raj.) and of the Hon'ble Supreme Court in Roy V.D.vs. State,2004(4)Crimes,196(SC). Mr.R.K.Charan, learned counsel for the appellant further argued that recovery of the opium in the instant case was highly doubtful because no time has been mentioned in the recovery memo(Ex.P/1) which is indicative of the fact that the same was not prepared at the site of the recovery but was subsequently prepared at

the Police Station. Besides there were contradictions in the statements of the witnesses as to the place from where recovery was made. The seizure memo was not prepared at the site of recovery by the prosecution. Learned counsel further argued that provisions of Section 55 and 57 of the Act were not complied with. He in this connection relied on the judgments of this Court in Krishna Kumar & Anr. vs. State of Rajasthan, 2004(1) Cr.L.R. p.617, Jarnail Singh & Anr. vs. State , 2005(7) R.D.C. p.2741 and Narain vs. State , 2002(1) Cr.L.R. (Raj.) p.645 and Gurbux Singh vs. State of Haryana, 2001 Cr.L.J. p.1166.

Mr.R.K.Charan, learned counsel for the appellant during the course of argument laid much emphasis on various aspects of link evidence and argued that there were many missing links in the evidence adduced before the Court regarding sampling of the contraband articles and its examination. No separate seal memo was prepared and this is proved from the fact that no such seal memo has been exhibited by the prosecution. This therefore raises a serious doubt whether any specific seal memo was sent alongwith

sample. Moreover, samples were not re-sealed as per provisions of the Section 55 of the Act. Carrier of the sample P.W. 3 Kan Singh remained conspicuously silent as to when he collected the sample from P.W. 1 Kishore Singh and delivered the same in the S.P. Office to P.W. 2 Pema Ram. Moreover malkhana entries (Ex.P/2) does not bear the signature of P.W. 3 Kan Singh which is even proved from the fact that Kan Singh in his statement admitted that he did not sign in the Malkhana register while taking the sample. P.W. 2 Pema Ram although stated that he gave the sample to P.W. 4 Gokla Ram alongwith samples of many other cases but P.W. 4 Gokla Ram in his statement has denied that he received any other samples alongwith this sample. This could be explained away if the prosecution had produced the relevant register of S.P. Office in regard to receipt of the sample and its subsequent delivery. Non-production of such record thus also raises serious doubt about the fact that such alleged sample which was sent to F.S.L. was part of the same contraband which was recovered from the site. Learned counsel further argued that while weight of the sample as per recovery memo

(Ex.P/1) was 30 gms., the F.S.L. report (Ex.P/11) records the weight of the sample inclusive of the weight of container as 67 gms. and therefore the net weight of the sample was not proved independently, thus raising a serious doubt about the correctness of the sample. Learned counsel drew attention of the Court towards that part of the statement of P.W. 1 Kishore Singh wherein he stated that when seal of the article was opened, inner packet did not contain the case number. Learned counsel in support of his argument regarding link evidence relied upon the judgments of this Court in (1) State of Rajasthan vs. Gurmail Singh, 2005 Cr.L.J. p.1746 (SC),(2) Budhram vs. State of Rajasthan, Cr.L.R.(Raj.) 2005(2) (3) Birma Ram vs. State of Rajasthan, 2005(2) Cr.L.R (Raj.) p.1593 (4)Pappu vs. State of Rajasthan, 2006 Cr.L.J., p.241 (5) Jairam vs. State, 2005(2) Cr.L.R.(Raj.) p.1507 (6) Gopal Lal vs. Union of India, 2006(3) R.D.D.(Raj.) p.1381 (7) Kailash & Anr. vs. State, 2006(3) R.D.D.(Raj.) p.1558 (8) Raju @ Gurcharan & Anr. vs. State , 2005(2) Cr.L.R.(Raj.) p.1222 and Shamsher Singh vs. State, 2005(7) R.D.D.(Raj.) p.2726. He therefore argued that the appeal be allowed and conviction and sentence

recorded by the learned trial Court be set aside and the accused be acquitted of the charges levelled against him.

On the other hand, Mr.Rameshwar Dave, learned Public Prosecutor for the State argued that offence against the appellant has been proved beyond reasonable doubt inasmuch as the evidence produced by the prosecution established the charge for offence u/s 18 of the Act against him beyond reasonable doubt.He has argued that minor contradictions in the statement of the prosecution witnesses cannot be blown out of proportions so as to completely exclude their evidence. On the question of authorisation of Sect. 42 of the Act, learned Public Prosecutor argued that this was a case where the police party had laid "Nakabandi" and during such "Nakabandi",the police party having doubt apprehended the accused appellant. According to the learned Public Prosecutor it was a case of chance recovery and provisions of Section 42 cannot be extended to such recovery when the police personnel during patrolling party found the accused having in possession of opium.Learned Public Prosecutor in this connection relied

upon the judgment of the Hon'ble Supreme Court in Babubhai Odhavji Patel, etc. vs. State of Gujarat, 2006(1) WLC p.79, State of Orissa vs. Rajendra Tripathy & Ors., 2005(2) W.L.C. p.135 and G.Srinivas Goud vs. State of A.P., W.L.C. 2005(2) p.627. Mr.Rameshwar Dave,learned Public Prosecutor therefore argued that there was no violation of Section 42 of the Act. He has referred to the statement of P.W. 3 Kan Singh and argued that Kan Singh has categorically proved that one sealed packet in the present case was given to him by P.W.1 Kishore Singh which he deposited with L.C. Pema Ram in S.P. Office with intact sealed condition. Learned Public Prosecutor further referred to the statement of P.W. 4 Gokla Ram wherein he stated that Pema Ram, L.C. in the office of S.P. Office gave to him one packet in sealed condition which he deposited with Forensic Science Laboratory at Jaipur in sealed condition. Learned Public Prosecutor has referred to that part of cross-examination of P.W. 4 Gokla Ram wherein he stated that he deposited the said packet in Forensic Science Laboratory on 3.3.1986 and obtained a receipt therefrom which he gave to Pema Ram. It was argued that the defence did not put any

question to him in cross-examination that may raise a doubt about intactness of the packet. He also referred to the statement of P.W. 2 Pema Ram wherein he stated that he received packet in sealed condition from Constable Kan Singh and prepared a forwarding letter for its onwards transmission to F.S.L. which was exhibited as Ex.P/14 on which signature of Shri Govind Narayan, Dy.S.P. was contained. He handed over that packet to P.W. 4 Gokla Ram in the sealed condition. Learned Public Prosecutor thus argued that there was no missing link in so far as the evidence regarding retention of the sealed packet handed over to S.P. Office and thereafter its onward transmissions to the F.S.L. is concerned.

On the question of weight of the sample, learned Public Prosecutor argued that report of F.S.L. shall have to be read in its entirety specially with its first part which pertain to the description of the packets where it pertain to the description of the packets where it is stated that the packet was one in number enclosed within white cloth cover and the seals were intact. Learned Public Prosecutor therefore argued that

F.S.L.Report (Ex.P/11) shall have to be read alongwith recovery memo (Ex.P/1) and therefore even if the F.S.L. report has given combined weight of the sample and its weight container, the weight of the sample would still be proved from recovery memo(Ex.P/1). He therefore argued that charge for the offence against appellant has been proved beyond reasonable doubt. The appeal is therefore liable to be dismissed.

I have considered the arguments advanced by both the learned counsel and scanned the record.

The first and foremost argument advanced by learned counsel for the appellant is that P.W.5 Banedan, S.H.O. of Police Station was an officer of the rank of Sub Inspector of police. He in his statement has mentioned that on 25.2.1986 at about 12.30 p.m. he alongwith policy party was on patrolling duty and had entered a report to this effect in Roznamcha which was proved as Ex.P/6. While on patrolling duty when they reached on the outskirts of village Dhok Dhoniya at about

5 p.m. they laid "Nakabandi" during which they noticed one person coming from village Dharasa. When he saw the police party, he left the road and started moving away from the road. Suspecting his moves, they intercepted that person and on being searched, one plastic bag containing some black substance was found from left pocket of his coat. When the said substance was tested and smelled, it was found to be opium. It is not in dispute that even though P.W. 5 Banedan was S.H.O. of the Police Station but he held the rank of Sub Inspector on the relevant date. The first of the many judgments cited on behalf of the appellants on this aspect is that of Nand Lal(supra) wherein this Court had occasion to consider the provisions of Section 42 of the Act. The Notification dated 16.10.1986 was issued by the State Government which authorise all Inspectors of police posted as Station House Officer to exercise the powers u/s 42 of the Act . The Court on consideration thereof held that "there can be no doubt prior to 16.10.1986 even Sub Inspector of police or any other Inspector of police could not have exercised the powers mentioned in Section 42 of the Act." In that case the date of

recovery was 23.11.1985 and therefore the Court held that police officers upto the rank of Inspector had no jurisdiction on the said date to inspect under Section 42 of the Act because the power upon them had been conferred for the first time on 16.10.986. It is significant to note that recovery in that case was made by Head Constable and therefore the Court further held that Head Constable was certainly not a Sub Inspector or Inspector of police and therefore conviction was set aside. This judgment was later followed in Umrav(supra), Shantilal(supra) and Biram(supra). The Hon'ble Supreme Court in Roy V.D. (supra) had the occasion to consider the true import and meaning of Sections 41 and 42 of the Act. That was a case in which Kerala High Court had dismissed the petition filed by the accused u/s 482 Cr.P.C. seeking quashment of the pending proceedings against him for offence u/s 20 on the ground that Excise Inspector who made the search and recovery from his possession became competent to do so with the issuance of the notification at a later stage. The Hon'ble Supreme Court however while quashing the proceedings, observed in para 16 as under:

> "16.Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section(1) of Section 36A of the NDPS Act. It follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorized officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial".

This Court in Bheru Lal(supra) took a similar view where the Sub Inspector of police was holding the charge of S.H.O. made search and seizure of the contraband item. While relying on Nand Lal(supra), the Court held that S.H.O. alone was competent to exercise the powers u/s 42 of the Act. Recently again in Harchand(supra) this Court has taken the similar view.

What has to be analyzed is whether in view of the subsequent judgments of the Hon'ble Supreme Court , the view

repeatedly taken by this Court with reference to interpretation of Section 42 of the Act would still hold good or has been watered down. In Babubhai Odhavji Patel(supra), the facts of the case were that on 1.7.1989 Sub Inspector of police alongwith constables was on patrol duty and at about 5.30 a.m. they noticed a tanker lorry passing through Palanpur railway station crossing line. They stopped the vehicle and made a search of the lorry. When they opened the lid of the first cabin of the lorry, a jute bag containing dark brown substance which ultimately was found to be opium was noticed. An argument was raised that since the search was conducted at 5.30 a.m. i.e. before the sunrise and therefore the PSI should have obtained a warrant or authorisation for conducting search of vehicle. The Hon'ble Supreme Court rejected the argument holding that it was a case of chance recovery and therefore procedure contemplated by Section 42 of the Act could not be complied with and that the opium was recovered when the usual search of suspected vehicles carrying such contraband was conducted and the police party had no previous information that any contraband substance was

concealed in any building, conveyance or enclosed space and they have to conduct a search pursuant to such information.

In Rajendra Tripathi (supra) also the question before the Hon'ble Supreme Court was whether there was any violation of Section 42 of the Act. In the facts of that case, the Hon'ble Supreme Court held that considering the time when search and seizure was made and the undisputed question that detention was made by the officers of the patrolling party, provisions of Section 42 would have no application. Judgment of the Hon'ble Supreme Court in Babubhai Odhavji Patel(supra) is quite categorical on the point even in regard to search conducted before the sunrise. If search is made by a patrolling party which incidentally come across a vehicle and recovery of contraband substance therefrom, no violation of Section 42 of the Act can be alleged. Similarly in Rajendra Tripathi(supra) their Lordships held that search and seizure was done and detention made while the officers were on patrolling duty and therefore Section 42 had no application.

This very view was taken by the Hon'ble Supreme Court in Sorabkhan Gandhkhan Pathan & Anr. vs. State of Gujarat, (2004) 13 S.C.C. p.608 wherein their Lordships held that the information received by the police officer was not in regard to any contraband article as contemplated under the NDPS Act but was with regard to certain illicit liquor. Therefore, the search made by the officer was not under the NDPS Act. It was only by accident that in the course of search for illicit liquor the officer concerned found 1960 grams of charas. Therefore, this was a case of chance recovery for which it was not necessary to follow the procedure contemplated u/s 42/50 of the NDPS Act.

In the present case, it has been clearly proved that the police party was on patrolling duty when they came across the accused who on seeing them started moving in other direction and thus giving rise to suspicion. He was then intercepted and searched. The search was made at 12.30 p.m. i.e. in full noon and therefore if the patrolling party had allowed the accused to let go just because they did not possess the

authorisation, that would have worked contrary to the object and intendment of the provisions of the Act. It was to cover situation like chance recovery by the police personnel while they are on patrolling duty that the law on the subject has undergone a major shift. All those judgments which have been relied upon by the learned counsel for the accused appellant are in regard to general authorisation conferred on the officers of the rank of Inspectors posted as Station House Officer. Facts of those cases reveal that in most of them except in Shantilal (supra), the investigation started on receipt of secret information about the contraband articles. This category of cases have been excepted even by the aforementioned judgments of the Hon'ble Supreme Court because the investigation in such cases has to commence being conscious of the facts that recovery and seizure of such contraband articles under the provisions of the Act of 1985 have to be made. A specific information as required by Section 42 of the Act of 1985 in such situation is required to be recorded by the officer empowered to conduct a search and the superior officers are required to be informed about the proposed

seizure. But all those requirements cannot be insisted upon in the case of a chance recovery made by a police party while on patrolling duty. The argument of the learned counsel for the appellant with regard to Section 42 of the Act of 1985 therefore merits rejection and is thus rejected.

There are however very many other arguments made by the learned counsel for the appellant in assailing the judgment passed by the leaned trial Court which need to be examined from the point of view if those arguments are upheld, whether recovery of the contraband articles become doubtful and whether there are missing links in the evidence adduced by the prosecution regarding retention and custody of samples and its examination especially in the context of its weight. It indicates that P.W. 5 Banedan , P.W. 1 Kishore Singh and Leeladhar have stated that Recovery memo (Ex.P/1) was prepared at the police station when the Station House Officer reached there at 7.30 p.m. on 25.2.1986. Ex.P/4, which is a letter addressed by S.P.Office, Barmer to F.S.L.,Jaipur indicates that the specimen seal memo was sent alongwith the

sample. The recovery memo on which specimen of the seal was affixed was prepared in presence of the witnesses namely, Sonaram, Thakra and Bhartaram. Recovery Memo(Ex.P/1) however states that the sample of the seal was affixed on the memo and in fact examination of Recovery Memo shows that the specimen sample of the seal was affixed thereupon and therefore this argument of the learned counsel for the appellant cannot be accepted.

P.W. 3 Kan Singh in his statement has categorically stated P.W. 1 Kishore Singh gave to him one sealed cover packet which he took to S.P. Office and deposited with P.W. 2 Pema Ram in the same sealed condition. Now the argument of the learned counsel for the appellant is that he did not state as to exactly on which date he received such sample and when did he hand over such sample in the S.P. Office. But this argument cannot be accepted because P.W. 3 Kan Singh in opening words of his statement has stated that he was posted at Police Station, Chauhtan on 1.3.1986 and thereafter stated about having received the sample in sealed condition and

handing over the same to Pema Ram in sealed condition. P.W. 2 Pema Ram also corroborates this fact when he states that he was posted in S.P. Office, Barmer on 1.3.1986 and on that day he received one packet in sealed condition from Kan Singh, a constable of Police Station, Chauhatan. He even goes to the extent of saying that he prepared the forwarding letter which was exhibited as Ex.P/4 which contained signatures of Shri Govind Narayan, Dy.Superintendent of Police . He handed over the sealed packet alongwith forwarding letter to constable Gokla Ram for being delivered to F.S.L., Jaipur.

P.W. 4 Gokla Ram has also corroborated the statements of P.W. 1 Kishore Singh and P.W. 2 Pema Ram when in the opening of his statements deposed that when he was posted at Police Station, Barmer on 1.3.1986, one sealed packet of Police Station, Chauhatan in C.R.No.16/86 was handed over to him by Pema Ram alongwith forwarding letter which he took to Jaipur and deposited with the F.S.L.,Jaipur in the same sealed condition and obtained receipt which was exhibited as Ex.P/5. This argument of the learned counsel for

the appellant also does not deserve acceptance and therefore rejected.

Now comes the argument that P.W. 2 Pema Ram has stated that he gave the sample to P.W. 4 Gokla Ram alongwith samples of other cases whereas Gokla Ram has denied having received samples of any other cases. Cumulative reading of statements of P.W. 2 Pema Ram and P.W. 4 Gokla Ram does not raise any doubt about the correctness of their version . P.W. 2 Pema Ram in the earlier part of his statement has categorically and distinctly stated that he gave the sealed packet to Gokla Ram alongwith forwarding letter. He received the said packet for being delivered at F.S.L. at Jaipur. What he stated in the cross examination is that after he received the sample in sealed condition, it remained with him for about 15-20 minutes. Gokla Ram had came to him for delivering the articles of some other case and therefore, Pema Ram further stated that he sent the sealed sample in the present case with Gokla Ram. He however did not narrate about the number of case of which article was brought by Gokla Ram but then that

had nothing to do with the present case because that only explain the reason why Gokla Ram came to S.P. Office. So long as Pema Ram is clear in his statement that he gave sealed sample to Gokla Ram for being delivered at F.S.L. Jaipur, his statement to that extent cannot be disbelieved particularly when Gokla Ram has proved Ex.P/5 which is the receipt of F.S.L. F.S.L. Report(Ex.P/11) clearly shows that the seals of the packet which was delivered at F.S.L.,Jaipur were found in intact condition. This argument also therefore cannot be accepted and is hereby rejected.

Now comes the next argument that the Malkhana Register(Ex.P/2) does not bear the signature of P.W. 3 Kan Singh in token of having received the sealed sample and when P.W. 3 Kan Singh himself has admitted having not made any such signatures. What is the significance of this argument is difficult to understand when P.W. 2 Pema Ram, P.W. 3 Kan Singh and P.W. 4 Gokla Ram has proved the continuous chain from origin of the sample till its delivery to F.S.L.,Jaipur without therebeing any missing link. What is being sought to be relied

upon by the learned counsel is true copy of Malkhana Register (Ex.P/2A). Ex.P/2A is the copy of that part of Malkhana Register where the entry of the articles deposited by Banedan, S.H.O. with the S.P. Office has been made and this does not contain entry of the dispatch of such sealed article to F.S.L. The argument of the learned counsel for the appellant on the strength of this document therefore is not substantiated particularly when P.W. 2 Pema Ram has proved that he gave a packet in sealed condition to P.W. 4 Gokla Ram alongwith forwarding letter in the same sealed condition in which he received such packet and P.W. 4 Gokla Ram categorically admits having received the packet in sealed condition and deposited the same in the very same sealed condition with the F.S.L. at Jaipur and obtained receipt which is Ex.P/5.

Now comes the argument with regard to weight of the sample being not proved to be 30 gms. when it was received in the F.S.L. Learned counsel for the appellant has laid much emphasis on this argument that if there is a discrepancy in the weight of the sample when it was sealed and the weight

of such sample when it was received in the F.S.L. at Jaipur, a doubt should arise about the correctness of the sample whether it was the same sample which was seized and benefit of such doubt should go the accused. He seeks to develop this argument on the basis of F.S.L. report according to which, the packet "contained semi-solid, sticiky dark brown coloured substance packed in a small size cylindrical tin container weighing 67 gm. alongwith the container." The description as given in the earlier column is that the packet was one in number and enclosed with white cloth which was properly sealed bearing impressions which tallied with the specimen seal impression forwarded and the seals were intact. Ex.P/1 is the recovery memo which has given complete description of the place where from the recovery was made and the fact that a polythene bag containing a black substance was recovered from the left side of the lower pocket of the coat of the accused which on weighment was found to be 160 gms. Out of which 30 gms. were taken for chemical examination and put in a small metal box which was packed and sealed. The recovery memo also stated that the specimen seal mark was being

made on the memo itself. The recovery memo contained this specimen seal. Banedan,S.H.O. Chauhatan when sent the sample of opium for onward transmission to F.S.L. for chemical examination, he had also sent the copies of the recovery memo as also copies of the documents containing specimen seals vide Ex.P/3. The S.P.,Barmer in his forwarding letter dated 1.3.1986 which is Ex.P/4 had also sent with that the copies of the FIR, recovery and the samples of the specimen of seal. They were sent to the F.S.L. to verify the correctness of the specimen seal and the safety of the sealed packet and F.S.L. report on that aspect categorically records that "the packet was enclosed within white cloth which was properly sealed bearing impressions which tallied with the specimen seal impression forwarded. The seals were intact." It was in subsequent part of the report that the weight of the container was recorded as 67 gms. which obviously included the sample opium too. On examination the sample was found to contain opium having 1.50% of morphine.

The mere fact that the F.S.L. report has not given

distinct and separate weight of the opium as also the container but has given their joint weighment should not be sufficient to raise a doubt about the fact whether it was the same sample or it was some other sample. This will have to be examined in the light of other exhibits duly proved by number of witnesses and the evidence of P.W. 5 Banedan who made search and recovery of the contraband article and stated about having prepared the packet containing 30 gms. of opium. Merely because distinct and separate weight of the opium was not taken by the F.S.L. does not mean that contraband article obtained therein was not the same and the sealed packet which was prepared by P.W. 5 Banedan while preparing Recovery memo (Ex.P/1) which was handed over by P.W. 1 Kishore Singh to P.W. 3 Kan Singh for being given to P.W. 2 Pema Ram who handed over the same to P.W. 4 Gokla Ram for deposit in the F.S.L. was got changed.

P.W. 1 Kishore Singh has stated that he was Malkhana Incharge and the sealed packet remained in his custody from 25.2.1986 to 1.3.1986 in sealed condition and he

gave this sample to P.W. 3 Kan Singh for being delivered in S.P.office, Barmer. P.W. 3 Kan Singh has admitted having received the packet in sealed condition from P.W. 1 Kishore Singh and handed over in the same sealed condition to P.W. 2 Pema Ram. P.W. 2 Pema Ram has also admitted having taken the sample in sealed condition from P.W. 3 Kan Singh and then handed over such packet in sealed condition to P.W. 4 Gokla Ram for onward transmission to the F.S.L. at Jaipur. P.W. 4 Gokla Ram has also admitted having received said packet in sealed condition from P.W. 2 Pema Ram and handed it over in the same sealed condition to F.S.L. at Jaipur and obtained the receipt Ex.P/5. This has therefore become a complete chain which conclusively prove that the packet throughout remained in sealed condition and this is further proved from the report of the F.S.L. where they stated as regards the description of the packet that "a packet one in number enclosed within white cloth cover which was properly sealed bearing impressions which tallied with the specimen seal impression forwarded. The seals were intact." At that stage when subjecting the sample from the contraband article to

chemical examination, the packet itself was subjected to weighment and it was not just the sample which was weighed and therefore, the combined weight of the two has been recorded therein. This factor alone should not be taken to have completely destroyed the entire prosecution evidence so meticulously prepared and adduced to prove the safe keeping of the sample from stage to stage. In my considered view however this factor cannot be attached with so much of significance as to completely destroy the entire prosecution case which has been proved beyond reasonable doubt that the contraband article recovered from the accused was opium containing 1.50% morphine.

This now takes me to all those case laws which the learned counsel for the appellant has relied on the question of discrepancy in the weighment of the samples prepared and there being variance in weight of the samples received at F.S.L., the weight of the samples was found to be reduced when it was weighed in the Forensic Science Laboratory. The present one is a case having a distinguishing feature from all

those cases which the learned counsel for the appellant has relied upon because in this case the weight of the sample has not been found to be reduced. On the basis of combined weight of the sample and container of 60 gms., learned counsel for the appellant however wants this Court to deduce therefrom that weight of the sample has become doubtful. I may in this connection refer to the judgment of the Hon'ble Supreme Court in State vs. Dilbagh, (2004) 13 S.C.C. p.99 wherein accused was originally convicted by the trial Court but was later acquitted by the High Court on the ground of non-compliance of Section 50 of the Act and that the samples taken were weighing 50 gms. but according to C.F.L what was received by them was 55.5 grams. It was held that because of this discrepancy, it could not be said with certainty that it was the same sample which has been taken and were sent to F.S.L. The Hon'ble Supreme Court held that "in such cases what has to be ensured is that what has been recovered is what has to be sent for chemical analysis. In case there is any doubt that what was received by the Chemical Analyser is not the same, then the benefit of that doubt could be given to the accused.

But in case where it is proved that what was sent to the Chemical Analyser is the same as what was recovered, minor differences in weight would not vitiate the trial." In the facts of that case, the Hon'ble Supreme Court when noted that one of the sample was about 50 gms. which necessarily means not exactly "50 gms." , the weight could be a little less or more. The evidence proved that samples were sealed with C.B.I. Seal. P.W. 3 in that case deposed that on being sealed , samples were sent to Malkhana. P.W.5 deposed that he was in charge of the Malkhana and that he received the samples in a sealed condition and they remained with him in the sealed condition. One sample was given by him by ASI B.K. Sharma to be taken to the Chemical Analyser alongwith a forwarding letter. ASI B.K. Sharma was examined as P.W. 4. He deposed that he received the sample in a sealed condition and that he delivered the sample to the Chemical Analyser. He deposed that he received the sample with the seal intact alongwith the forwarding letter. The forwarding letter did not contain any weight. It was only when the Chemical Analyser weighed the sample that the exact weight was found to be 55.5 grams. The

Hon'ble Supreme Court noted that not a single question was put to any of the witnesses in the cross-examination that the seal had been tampered with. All that was asked to P.W. 1 ASI B.K. Sharma was that F.S.L. form in triplicate was not prepared or not sent to Chemical Analyser. Merely because no such form was prepared or sent, does not in any way reflect on the fact that it was the sample which was extracted from the recovered opium and which reached the Chemical Analyser with the seals intact.

In the light of the discussion of the evidence in the present case, it would be evident that the ratio of the judgment of Hon'ble Supreme Court in Dilbag(supra) should squarely apply to the present case on all its four corners.

Coming now to the last plank of the arguments that since the time was not indicated in the recovery memo and the same was not prepared at the site of the recovery and was later prepared at the Police Station therefore recovery becomes doubtful, I may in this connection only refer to the law

propounded by their Lordships of the Hon'ble Supreme Court in Khet Singh vs. Union of India, (2002) 4 S.C.C. p.380. That was a case in which an argument was raised that the police officer did not prepare the seizure mahazar/seizure memo at the spot and therefore the evidence collected by the prosecution was not admissible and further that the standing instructions issued in this behalf by the Narcotics Central Bureau were not complied with and further that there was delay in depositing the seized drugs in the godown. All these factors, it was argued, caused serious prejudice to the accused and therefore his conviction was vitiated on that account. Their Lordships while repelling this argument held in para 10 as under :-

> "10. .....xxxxx .....It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in acordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking,

> the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody."

Reference was also made to the earlier case law on the subject namely;(i) State of H.P. vs. Prithvi Chand, (1996) 2 SCC p.37,(ii) Radha Kishan vs. State of U.P., AIR 1963 SC p.822 and (iii) State of Maharashtra vs. Natwarlal Damodardas Soni, (1980) 4 SCC p.669 while reiterating the law in those cases, their Lordships held that every details of the procedure for search does not necessarily lead to the conclusion that illegal search and seizure by the police renders the recovery of the articles and its evidence inadmissible at the

trial. Although such evidence would be required to be examined carefully with a view to finding out whether any serious prejudice has been caused to the accused. In view of what has been discussed above, I do not find any serious prejudice was caused to the appellants by mere reason of the fact that seizure memo was prepared at the Police Station in stead of being prepared at the site of recovery.

Upshot of the aforesaid discussion is that, the present appeals fails and the same is hereby dismissed. Consequences to follow.

(MOHAMMAD RAFIQ),J.